STATE OF MICHIGAN
IN THE SUPREME COURT
(ON APPEAL FROM THE COURT OF APPEALS)

KEVIN MACLACHLAN, ~~as~~ Personal Representative of the Estate of DAVID MACLACHLAN, Deceased,

Plaintiff-Appellee,

v

and CITY OF LANSING, ~~a municipal corporation,~~

Defendant-Appellant,

~~and~~

CAPITAL AREA TRANSPORTATION AUTHORITY ~~(CATA)~~ and JOHN DOE, ~~an employee of CATA,~~

Defendants.

S. Ct. No. _____ GMA 1/20/05
C.A. No. 252221
L.C. No. 02-1949-NI
Ingham
B. N-Nickerson

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NOTICE OF HEARING

APPLICATION FOR LEAVE TO APPEAL

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STATEMENT IDENTIFYING COMPLAINED-OF OPINION AND SETTING FORTH REQUESTED RELIEF

Pursuant to MCR 7.302(A)(1)(a), defendant-appellant City of Lansing states that the within application for leave to appeal seeks the Court's review of the court of appeals' January 20, 2005 opinion reversing the Ingham County Circuit Court's October 1, 2003 order granting City of Lansing's motion for summary disposition. The City of Lansing seeks a peremptory reversal of the court of appeals' opinion and, failing that, a grant of this application for leave to appeal.

STATE OF MICHIGAN

COURT OF APPEALS

KEVIN MACLACHLAN, Personal Representative of the Estate of DAVID MACLACHLAN, Deceased,

Plaintiff-Appellant,

v

CAPITAL AREA TRANSPORTATION AUTHORITY, CITY OF LANSING, and JOHN DOE,

Defendants-Appellees.

UNPUBLISHED
January 20, 2005

No. 252221
Ingham Circuit Court
LC No. 02-001949-NI

Before: Jansen, P.J., and Murray and Donofrio, JJ.

PER CURIAM.

Plaintiff Kevin MacLachlan, as personal representative of the estate of David MacLachlan, deceased, appeals as of right the order granting defendants Capital Area Transportation Authority (CATA), City of Lansing, and John Doe, a CATA employee, summary disposition under MCR 2.116(C)(7). We affirm the portion of the trial court's order granting CATA and John Doe summary disposition on the basis of governmental immunity. But, we reverse the portion of the court's order granting the City of Lansing summary disposition.

The facts are undisputed for purposes of the appeal. Plaintiff's decedent, a forty-nine-year-old who suffered from mental and physical disabilities, was a daily passenger of the CATA bus system and used the bus as transportation between his residence and place of employment. Prior to December 15, 2000, Lansing had sustained multiple snowstorms with significant amounts of snowfall with temperatures consistently below freezing. At approximately 5:15 p.m. on December 15, 2000, decedent was a passenger on a CATA bus heading south on Pennsylvania Avenue. The bus driver stopped the bus at a designated CATA bus stop near the 5700 block of Pennsylvania Avenue, and decedent exited. The location of the stop and the surrounding sidewalks had not been cleared for several days and as a result of plowing were covered and mounded with several feet of ice and snow. After exiting the bus, decedent was trapped between the bus and the accumulated ice and snow that created a steep "wall." The

three-to-four-foot high "snow wall" made it impossible for decedent to leave the roadway which was being traveled by a high volume of traffic. Because he could not reach the sidewalk, decedent began walking north adjacent to the curb against the southbound traffic. An oncoming vehicle struck decedent and he later died. [1]

Plaintiff first argues that the trial court erred in granting CATA's motion for summary disposition, finding that plaintiff's claim was barred by governmental immunity. Plaintiff claims that CATA effectively denied that it was a municipal entity and, cannot, therefore, claim governmental immunity. Plaintiff further argues that even if CATA can assert governmental immunity, CATA is nevertheless liable under the motor vehicle exception because the activity of letting passengers on and off the bus constitutes "negligent operation" in that it is directly associated with the driving of a motor vehicle, the bus was still at the scene when the accident occurred, and CATA violated a Lansing ordinance requiring snow removal. We disagree.

A trial court's ruling on a motion for summary disposition is reviewed de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). The applicability of governmental immunity is a question of law reviewed de novo. *Baker v Waste Management of Michigan, Inc*, 208 Mich App 602, 605; 528 NW2d 835 (1995).

Under MCR 2.116(C)(8), the legal basis of the complaint is tested by the pleadings alone. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). All factual allegations are taken as true and any reasonable inferences or conclusions that can be drawn from the facts are construed in the light most favorable to the nonmoving party. *Id.* The motion should be denied unless the claim is so clearly unenforceable as a matter of law that no factual development can possibly justify a right to recover. *Id.* A motion for summary disposition may also be raised on the ground that a claim is barred because of immunity granted by law. MCR 2.116(C)(7). The Governmental Tort Liability Act (GTLA), MCL 691.1401 *et seq.*, "provides broad immunity from tort liability to governmental agencies whenever they are engaged in the exercise or discharge of a governmental function[.]" *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 595; 363 NW2d 641 (1984); see MCL 691.1407(1). To survive a (C)(7) motion raised on these grounds, the plaintiff must allege facts warranting the application of an exception to governmental immunity. *Smith v Kowalski*, 223 Mich App 610, 616; 567 NW2d 463 (1997). Neither party is required to file supportive material; any documentation that is provided, however, must be admissible evidence. *Maiden, supra*, 461 Mich 119. Therefore, when considering a motion brought under both MCR 2.116(C)(8) and (C)(7), it is proper for the court to review all the material submitted in support and in opposition to the plaintiff's claim. *Patterson v Kleiman*, 447 Mich 429, 431-435; 526 NW2d 879 (1994). The plaintiff's well-pleaded factual allegations, affidavits, or other admissible documentary evidence must be accepted as true and construed in the plaintiff's favor, unless contradicted by documentation submitted by the movant. MCR 2.116(G)(5); *Maiden, supra* at 119; *Smith, supra* at 616.

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[1] Plaintiff's claims against the driver of that vehicle were settled prior to the commencement of this case.

As an initial matter, there is no question that, as a transportation authority, CATA is a governmental agency entitled to governmental immunity. See MCL 691.1401(b) and (d). We note that although CATA initially stated in its responsive pleading that it neither admitted nor denied this fact, CATA later withdrew that response and admitted that it was a governmental agency on the record.

Plaintiff's contention that CATA violated Lansing City Ordinance No. 1020.06(a)[2] is plainly incorrect. This provision is inapplicable in the present case because CATA does not own or occupy any house, building, or lot in the area surrounding the bus stop.

When a governmental agency engages in a governmental function, "it is immune from tort liability, unless the activity . . . falls within one of the other statutory exceptions to the governmental immunity act." *Ross, supra* at 620, see MCL 691.1401(f). It is not disputed that defendants were engaged in a governmental function. The "motor vehicle" exception, which is to be narrowly construed, *Chandler v Muskegon Co*, 467 Mich 315, 320; 652 NW2d 224 (2002), provides that governmental agencies shall be liable for damage resulting from the negligent operation of a motor vehicle. MCL 691.1405. The term "motor vehicle" includes a bus. *Stanton v City of Battle Creek*, 466 Mich 611, 618; 647 NW2d 508 (2002).

The mere involvement of a motor vehicle is not sufficient to abrogate immunity. See *Peterson v Muskegon Co Bd of Road Comm'rs*, 137 Mich App 210; 358 NW2d 28 (1984). "Negligent operation" of a vehicle requires that the motor vehicle was "being operated *as* a motor vehicle," and the exception encompasses only activities that "are directly associated with the driving of a motor vehicle." *Chandler, supra* at 320-321; *Poppen v Tovey*, 256 Mich App 351, 355-356; 664 NW2d 269 (2003). "Operation" is more narrowly defined than "use," which "may also include a range of activity unrelated to actual driving." *Chandler, supra* at 320 n 7, quoting *Pacific Employers Ins Co v Michigan Mut Ins Co*, 452 Mich 218, 226; 549 NW2d 872 (1996). "Determining when, where, and how to drop off passengers are decisions concerning the 'use' of the bus[,]" – activities "unrelated to actual driving." *Chandler, supra* at 320 n 7.

> 'To be in operation, the vehicle must be in a 'state of being at work' or 'in the active exercise of some specific function' by performing work or producing effects *at the time and place the injury is inflicted.*' [*McNees v Scholley*, 46 Mich App 702, 706; 208 NW2d 643 (1973), quoting *Orlowski v Jackson State Prison*, 36 Mich App 113, 116; 193 NW2d 206 (1971), quoting *Chilcote v San Bernardino Co*, 23 P2d 748, 749 (Cal, 1933) (emphasis supplied by *McNees*).]

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[2] Lansing City Ordinance No. 1020.06(a) states:

> No person shall permit any snow or ice to remain on any sidewalk adjacent to any house, building or lot owned or occupied by that person, or on the sidewalk adjacent to any multifamily dwelling or unoccupied house, building or lot owned by that person, for more than twenty-four hours after the same has fallen or formed.

We no longer strictly apply the "time and place" requirement, however, because, "[t]he proper question, . . . is whether, under all the facts alleged by a plaintiff, the injuries suffered by the plaintiff may, in fact, be said to have resulted from the negligent operation of a motor vehicle." *Peterson, supra* at 213-214.

Even assuming that the bus was still present at the time the accident occurred, there was no allegation that the bus driver or CATA were negligent in the physical act of dropping plaintiff off at the designated bus stop. Designating a particular bus stop and failing to provide for an alternate stop are separate from the operation of the bus itself. The narrow construction of the motor vehicle exception in *Robinson v Detroit*, 462 Mich 439, 456; 613 NW2d 307 (2000), requires that plaintiffs' injuries "resulted from" the government-owned vehicle, i.e., that the vehicle was physically involved in causing plaintiffs' injuries while in operation as a motor vehicle. MCL 691.1405. Here, there was no such evidence. Decedent was not injured while on or exiting the bus, and the bus did not in any way physically cause Zapolski's vehicle to strike decedent as decedent walked in the roadway. The trial court did not err in granting summary disposition to CATA where, under a narrow construction of the motor vehicle exception, decedent's death did not result from the negligent operation of the CATA bus.

Plaintiff next argues that the trial court erred by dismissing plaintiff's gross negligence count against CATA bus driver, John Doe, when the discovery period was still open and discovery of this issue was not complete because plaintiff had not yet had a chance to depose CATA's executive director. Plaintiff further claims he was denied the opportunity to determine the identity of the bus driver or the circumstances that rendered the driver's conduct grossly negligent. He claims the court erred in finding that the bus driver was not grossly negligent because a reasonably prudent bus driver would not have dropped a passenger off at that location and/or warned the passenger of the danger posed.

If reasonable jurors could honestly reach different conclusions regarding whether conduct constitutes gross negligence, the issue is a factual question for the jury and summary disposition is precluded. *Stanton v City of Battle Creek*, 237 Mich App 366, 375; 603 NW2d 285 (1999), aff'd 466 Mich 611 (2002). However, if reasonable minds could not differ, the issue may be determined by summary disposition. *Id.*

The mere fact that the discovery period remains open does not automatically mean that the court's decision to grant summary disposition was untimely or otherwise inappropriate. Here, further discovery did not stand a fair chance of uncovering factual support for plaintiff's position. See *Dep't of Social Services v Aetna Casualty & Surety Co*, 177 Mich App 440, 446; 443 NW2d 420 (1989). We do not decide that the identification and the taking of the deposition of the bus driver could not stand a fair chance of producing more factual support that would bring plaintiff's allegations within the realm of gross negligence, which is required to impose liability on a government employee. MCL 691.1407(2); *Stanton, supra* at 374.

To be the proximate cause of an injury, gross negligence of a government employee that subjects him to liability must be "the one most immediate, efficient and direct cause" preceding

the injury.[3] *Robinson, supra*, 462 Mich 462. Assuming for the purposes of this opinion that the conduct of the bus driver did constitute gross negligence, that is but one of three causes that combined to be causative in bringing about decedent's injuries. Clearly, the one most immediate, efficient, and direct cause of decedent's death was the car striking him, and the next most direct cause of that event was decedent choosing to get off the bus at that particular location and begin walking down the road. The bus driver's conduct, again assuming gross negligence, while a cause of decedent's death, it was but one cause, and was therefore, not "the" proximate as required by *Robinson. Id.*

Accordingly, we conclude that the trial court did not err in granting summary disposition to John Doe, the bus driver. There was not a fair chance that further discovery would uncover any further facts that would support a finding that the bus driver's conduct was "the proximate cause" of decedent being struck by a vehicle.

Plaintiff's argument that the trial court erred in granting CATA's motion for summary disposition because plaintiff has a common law action against CATA based on CATA's status as a common carrier is without merit. The GTLA provides broad immunity for government agencies from tort liability unless the conduct falls within one of a few narrow exceptions. There is no recognized common carrier exception that would allow plaintiff to circumvent the immunity afforded by the GTLA.

Plaintiff argues that the trial court erred in granting the City of Lansing's motion for summary disposition because the city is liable under the highway exception when the wall of snow and ice was an unnatural accumulation. We agree.

The City of Lansing is a governmental agency that is immune from tort liability while engaging in a governmental function, unless one of the statutory exceptions applies. MCL 691.1401(b) and (d); *Ross, supra* at 620. A municipality's maintenance and repair of "highways," which includes sidewalks and public streets open to travel, constitutes the performance of a governmental function. MCL 691.1401(e); *Haliw v City of Sterling Heights*, 464 Mich 297, 303-304 n 7; 627 NW2d 581 (2001). However, § 2 of the GTLA sets forth the "highway" exception, which is to be narrowly construed. MCL 691.1402(1); MCL 691.1402a; *Nawrocki v Macomb Co Rd Comm'n*, 463 Mich 143, 156 n 14, 158; 615 NW2d 702 (2000).

Where a plaintiff pleads a cause of action in avoidance of governmental immunity, the first step of a two step analysis is satisfied. *Haliw, supra* at 304. There is no dispute that plaintiff has so pled in this case. The plaintiff must still prove the remaining elements of traditional negligence, the second step of the analysis. *Id.* Pertinent to the second step of the analysis are concepts such as the "natural accumulation" doctrine. *Id.* at 305. Under the long-recognized "natural accumulation" doctrine, "'a governmental agency's failure to remove the natural

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[3] See *Tarlea v Crabtree*, 263 Mich App 80, 92; 687 NW2d 333 (2004) stating that the defendants' conduct was not the proximate cause of the plaintiff's death due in part to heat stroke where the plaintiff had the option to not participate in a football-camp run or to stop and rest during the run.

accumulations of ice and snow on a public highway does not signal negligence of that public authority.'" *Id.*, quoting *Stord v Transportation Dep't*, 186 Mich App 693, 694; 465 NW2d 54 (1991). When, however, the accumulation of ice and snow is the result of unnatural causes, the municipality may be liable. *Hampton v Master Products, Inc*, 84 Mich App 767, 770; 270 NW2d 514 (1978).

If there is any question regarding whether the condition was natural or unnatural, determination of this question of fact is within the province of a jury. *Whinnen v 231 Corp*, 49 Mich App 371, 377; 212 NW2d 297 (1973). Here, however, there is no dispute that the wall of ice and snow was created by the plowing efforts of the City of Lansing. Thus, reasonable minds could not differ on the fact that the snow wall was an unnatural accumulation. *Hampton, supra* at 772.

We recognize that a city should not be punished merely for removing snow from the roadway. *Skogman v Chippewa County Rd Comm'n*, 221 Mich App 351, 354, 356; 561 NW2d 503 (1997). However, a municipality can be held liable if in clearing ice and snow it "introduced a new element of danger not previously present, or created an obstacle to travel, such as a snow bank, that exceeds the inconvenience posed by a natural accumulation." *Id.* at 354. Here it is alleged that a wall of snow and ice, three-to-four-feet high and created by the defendant city, caused an unusual obstacle that increased the hazard to decedent. See *Id.*; *Hampton, supra* at 770. A jury may conclude that the city's act of piling ice and snow so high that it would be difficult, if not impossible, to traverse, introduced a new element of danger that exceeded the inconvenience posed by a natural accumulation. Plaintiff through his expert presented evidence that the city had adequate time to remove the snow wall from the bus stop and that it would not have been an unreasonable burden in light of the potential risk for the city to leave or create an opening in the piled snow to allow access to the sidewalk in an area designated as a bus stop. We accordingly conclude that plaintiff has created a justiciable question of fact relative to the alleged unnatural accumulation of ice and snow in the form of a snow wall and in avoidance of governmental immunity.

The portion of the trial court's order granting CATA and John Doe summary disposition is affirmed, but we reverse the portion of the court's order granting the City of Lansing summary disposition and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Christopher M. Murray
/s/ Pat M. Donofrio

STATE OF MICHIGAN

IN THE INGHAM COUNTY CIRCUIT COURT

GENERAL TRIAL DIVISION

KEVIN MACLACHLAN, as
Personal Representative of the
Estate of David MacLachlan, Deceased,

Plaintiff,

v

CAPITAL AREA TRANSPORTATION AUTHORITY (CATA), CITY OF LANSING, a municipal corporation, and **JOHN DOE,** an employee of CATA,

Defendants.

OPINION AND ORDER

Hon. Beverley Nettles-Nickerson

Docket No.: 02-1949-NI

This Court, having considered separate motions for summary disposition, submitted by Defendant Capital Area Transportation Authority (CATA) and Defendant City of Lansing, Plaintiff's responses thereto and having heard oral arguments on September 10, 2003, issues the following Opinion and Order.

OPINION

FACTS

On December 15, 2000, David MacLachlan (decedent) was a fare-paying passenger on a CATA bus, which was headed southbound on Pennsylvania Avenue in the City of Lansing. After exiting the bus at a designated CATA stop, decedent encountered a wall of ice and snow that was approximately three to four feet high. At this point, the decedent started walking northbound on

Pennsylvania Avenue against southbound traffic, in the lane closest to the curb. While walking, decedent was struck by a vehicle driven by Robert Zapolski. The decedent was thrown several feet into the air; he died two days later on December 17, 2003.

Plaintiff, as Personal Representative of the Estate of David MacLachlan, has filed a multi-count Complaint alleging that the Defendants breached legal duties owed to the decedent.

In response to Plaintiff's Complaint, the following motions have been filed: Defendant City of Lansing's Motion for Summary Disposition, pursuant to MCR 2.116(C)(7) and (8); and Defendant CATA's Motion for Summary Disposition, pursuant to MCR 2.116(C)(7).[1]

Defendant City of Lansing's Motion for Summary Disposition

Only Count V of Plaintiff's multi-count Complaint pertains to the City of Lansing. In Count V, Plaintiff complains that the City of Lansing owed a duty to act with reasonable and appropriate care in keeping its sidewalks and streets safe and fit. The essence of Plaintiff's argument is that the snow and ice was piled so high that it amounted to a "defect of the improved portion of the highway."

More specifically, Plaintiff argues the following:

1. The City of Lansing failed to maintain its city streets, sidewalks, and surrounding areas reasonably free of excessive ice and snow;
2. The City created an unnatural accumulation of ice and snow that blocked pedestrians from being able to safely move off the main road;

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[1] Defendant CATA's motion includes Defendant John Doe, an employee of CATA.

3. The City failed to undertake any and all reasonable measures to keep bus stops and surrounding areas free from the excessive buildup of snow, ice, and other debris; and

4. The City failed to ensure that passengers would be able to safely move off the main road and reach an area of reasonable safety once departing from CATA vehicles at designated CATA stops.

Turning to Defendant City of Lansing's summary motion, the City of Lansing seeks dismissal of Plaintiff's Complaint, on the ground of governmental immunity, pursuant to MCR 2.116(C)(7) and (8).

In support of their governmental immunity argument, the City of Lansing argues the following:

1. A municipality's maintenance and repair of its highways constitute the performance of a governmental function. MCL 691.1401; MSA 3.996(101); *Haliw v City of Sterling Heights,* 464 Mich 297, 303-304; 627 NW2d 581 (2001)

2. Plaintiff lacks a viable claim under Michigan's highway exception, MCL 691.1402(1); MSA 3.996(102)(1), because the alleged defect of which Plaintiff complains (piled snow and ice forming a wall along the side of Pennsylvania Avenue) is not a "defect" and, thus, does not fall within the proper meaning of MCL 691.1402(1). *Nawrocki v Macomb County Road Comm'n,* 463 Mich 143; 615 NW2d 702 (2000).

3. A governmental agency's failure to remove natural accumulations of ice and snow on a public highway does not signal negligence by the public authority. *Haliw* at

305, citing *Stord v Transportation Dep't,* 186 Mich App 693, 694; 465 NW2d 54 (1991).

4. Plaintiff has not alleged and cannot prove an "independent defect" other than an alleged accumulation of ice and snow as a proximate cause of decedent's injury.

5. The clearing of the snow did not introduce a new element of danger and, as such, the increased danger doctrine is not available as a basis for imposing liability. *Weider v Goldsmith,* 353 Mich 339; 91 NW2d 283 (1958).

Discussion

Relying upon governmental immunity, the City of Lansing has brought this motion, pursuant to MCR 2.116(C)(7) and (8). When reviewing a motion pursuant to MCR 2.116(C)(7), the Court considers all affidavits, pleadings, and other documentary evidence submitted by the parties and, where appropriate, construes the pleadings in favor of the plaintiff. A motion under this subrule should be granted only if no factual development could provide a basis for recovery. *Smith* v *YMCA of Benton Harbor/St Joseph,* 216 Mich App 552, 554; 550 NW2d 262 (1996). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." When deciding a motion brought under this section, a court considers only the pleadings. *Maiden* v *Rozwood,* 461 Mich 109; 597 NW2d 817 (1999).

The issue of governmental immunity was recently addressed by the Michigan Supreme Court in *Mack v City of Detroit,* 467 Mich 186; 649 NW2d 47 (2002). In that case, the Court stated that

governmental immunity is a characteristic of government and, as such, a party suing a governmental unit must plead in avoidance of governmental immunity. In addition, in *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567; 363 NW2d 641 (1984), the Michigan Supreme Court dictated the scope of Michigan's statutory immunity scheme as described in MCL 691.1407 – as providing for "broad" immunity from tort liability to governmental agencies whenever they are engaged in the exercise or discharge of a governmental function. *Id.* at 595.

Post-*Ross* decisions have provided broad immunity to governmental agencies from tort liability and have narrowly construed any exceptions to that immunity. See *Nawrocki v Macomb County Road Commission*, 463 Mich 143; 615 NW2d 702 (2000) and *Peterman v Dep't of Natural Resources*, 446 Mich 177; 521 NW2d 499 (1994). The *Nawrocki* holding is determinative of Defendant's instant motion in that a pile of ice and snow does not fall within the definition of a "highway defect." Furthermore, the recent Michigan Supreme Court ruling in *Hansen v Board of County Road Commissioners of the County of Mecosta*, 465 Mich 492; 638 NW2d 396 (2002), makes it clear that the duty applicable to all governmental agencies relates to actual roadway maintenance and repair issues. *Hansen* at 502. Thus, this Court finds that Plaintiff has failed to state a claim upon which relief can be granted; Defendant City of Lansing's Motion for Summary Disposition is granted.

Defendant CATA's Motion for Summary Disposition

Plaintiff's Complaint has allegations against CATA and CATA's bus driver, referred to as John Doe in the Complaint. Plaintiff alleges that duties owed to the decedent were breached when the decedent was discharged from the bus in a dangerous location. Plaintiff alleges that this action amounted to actionable negligence against CATA and the driver of the CATA bus.

In his Complaint, Plaintiff asserts that the following duties were breached:

1. to prudently hire, train, and supervise its drivers to recognize potentially hazardous conditions and to take all necessary steps to enhance passenger and pedestrian safety;
2. to ensure that passengers are not exposed to foreseeable safety hazards and risks, including but not limited to ingress and egress from CATA busses;
3. to take all reasonable measures to keep its bus stops and surrounding areas free of excessive build-up of snow, ice, and other debris;
4. to ensure that CATA bus stops and surrounding areas are reasonably accessible to CATA passengers and pedestrians;
5. to ensure or otherwise assist in ensuring that CATA passengers are able to safely move off the main road and reach an area of reasonable safety, once departing from CATA busses;
6. to plan for and recognize weather-related situations that require passenger drop-offs at alternative sites, such as the nearest crossroad or at the next clear and accessible CATA bus stop;
7. to warn passengers of inherently dangerous conditions/areas and refrain from stopping so as to prevent passengers from departing the bus in those areas; and
8. to stop at a reasonably safe location for its passengers.

Plaintiff further asserts that CATA violated Lansing City Ordinance No. 1020.06 in allowing the snow to remain at its designated bus stops. Plaintiff argues that; as a result, CATA created an

unsafe condition because it forced the decedent to walk on the traveled portion of the roadway, which eventually led to his injuries and death.

Discussion

Relying upon governmental immunity, CATA has brought its summary motion, pursuant to MCR 2.116(C)(7), previously discussed.

The Michigan Supreme Court dictated the scope of Michigan's statutory immunity scheme as described in MCL 691.1407 – as providing for "broad" immunity from tort liability to governmental agencies whenever they are engaged in the exercise or discharge of a governmental function. *Ross, supra* at 5. There are only five exceptions to this rule:

1. MCL 691.1402 - the highway exception;
2. MCL 691.1405 - the motor vehicle exception;
3. MCL 691.1406 - the public building exception;
4. MCL 691.1413 - the proprietary function exception; and
5. MCL 691.1407(4) - the governmental hospital exception.

The motor vehicle exception, MCL 691.1405, provides that "[g]overnmental agencies shall be liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is an owner . . ." In *Chandler v Muskegon County,* 467 Mich 315; 652 NW2d 224 (2002), the Michigan Supreme Court concluded that "'operation of a motor vehicle' encompasses only those activities that are directly associated with the driving of a motor vehicle." *Chandler* at 321.

The Michigan Court of Appeals applied the *Chandler* Court's conclusion and affirmed a dismissal by a circuit court in *Poppen v Tovey,* 256 Mich App 351; 664 NW2d 269 (2003) (leave to appeal denied, August 29, 2003). *Tovey* involved a motor vehicle accident where the Plaintiff collided with a City of Grand Rapids water truck that had stopped in the curb lane. The *Tovey* plaintiff filed a lawsuit against the City and the driver of the water truck alleging that the driver was grossly negligent. In upholding the circuit court's dismissal, the appellate court stated:

> 'Operation of a motor vehicle' only encompasses those activities that are directly associated with the driving of a motor vehicle. At the time of the collision . . . the City vehicle had been stopped in order to permit its passengers to inspect a public utility. Once stopped for this purpose, its presence on the road was no longer 'directly associated with the driving' of that vehicle. Accordingly, the vehicle was not being operated 'as' a motor vehicle at the time of the accident and summary disposition in favor of the City was appropriate.

Recently, the Michigan Court of Appeals, in *Puroll v Gaylord Community School District, et al,* Michigan Court of Appeals No. 234445, July 24, 2003 (unpublished opinion), citing *Robinson v Detroit,* 462 Mich 439; 613 NW2d 307 (2000) and *Chandler v Muskegon County,* 467 Mich 315; 652 NW2d 224 (2002), held that a plaintiff's allegations that did not comprise activities directly associated with driving of a bus as a motor vehicle are insufficient pleading in avoidance of governmental immunity – negligent acts alleged such as bus-route design, designation of particular bus stops, failure to provide supervision, failure to educate regarding safety are activities that are separate from the operation of the bus itself and therefore governmental immunity applies.

In addition, this Court is persuaded by *McNees v Scholley,* 46 Mich App 702; 208 NW2d 643 (1973), in which the Michigan Court of Appeals affirmed summary disposition in favor of a public school district when a negligently placed bus stop led to a pedestrian-automobile accident. In

McNees, the court stated that the "operation" exception applies when the bus is "in a state of being at work . . . at the time and place the injury was inflicted." *Id.* at 706. Also persuasive is *Cobb v Fox,* 113 Mich App 249; 317 NW2d 583 (1982), where another court found that the exception did not apply when a passenger was killed in an accident shortly after being dropped off by a bus.

With regard to Plaintiff's alleged negligence against the CATA bus driver, it is well-established that a governmental employee is entitled to governmental immunity unless the employee's conduct amounted to "gross negligence."

"Gross negligence" as defined in MCL 691.1407(2)(C) is "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." To be the proximate cause of the injury, the gross negligence must the "the one most immediate, efficient, and direct cause of the injury or damage." *Robinson v Detroit,* 462 Mich 439; 613 NW2d 307 (2000). Evidence of ordinary negligence does not create a question of fact regarding gross negligence. *Maiden v Rozwood,* 461 Mich 109 (1999).

Based on the current record before this Court, this Court finds that Plaintiff's allegations against the bus driver do not amount to gross negligence. The record is devoid of any facts to suggest that the decedent's choice to exit the bus at that particular stop was against his free will. In addition, once the decedent departed the bus, he chose how to proceed to his next destination, including the option to wait for another bus. The fact that the decedent chose to walk in the roadway does not create a liability upon the Defendants. Moreover, this Court finds that the actions of the Defendants in this matter, were not the "most immediate, efficient, and direct cause of [decedent's] injury or damage." Therefore, summary disposition is granted in favor of all Defendants.

ORDER

IT IS ORDERED that Defendant City of Lansing's Motion for Summary Disposition is GRANTED, for reasons consistent with those stated above, pursuant to MCR 2.116(C)(7) and (8).

IT IS FURTHER ORDERED that Defendant Capital Area Transportation Authority's Motion for Summary Disposition is GRANTED, for reasons consistent with those stated above, pursuant to MCR 2.116(C)(7). This Order includes dismissal of Defendant John Doe, an employee of CATA.

Dated: October 1, 2003

Beverley Nettles Nickerson

Hon. Beverley Nettles-Nickerson
Circuit Court Judge

PROOF OF SERVICE

I certify that I mailed a true copy of the above **OPINION AND ORDER** upon all attorneys of record or parties by placing said copy in the first class mail with postage prepaid from Lansing, Michigan, on October ____, 2003.

Angela Morgan
Judicial Assistant

cc: Lawrence P. Nolan
Vincent P. Spagnuolo
David K. Otis

STATEMENT OF THE QUESTION PRESENTED

THE COURT OF APPEALS SUMMARILY CONCLUDED THAT PLAINTIFF HAD PLED A CLAIM IN AVOIDANCE OF IMMUNITY. PLAINTIFF'S SUIT WAS PREMISED ON THE NOTION THAT A THREE TO FOUR-FOOT HIGH PILE OF SNOW CREATED AS A RESULT OF THE CITY'S ENDEAVORS TO REPAIR AND MAINTAIN ITS HIGHWAYS HAS CONSTITUTED A HIGHWAY DEFECT WITHIN THE MEANING OF MCL 691.1402(1). IS THIS COURT'S REVIEW WARRANTED IN LIGHT OF THE COURT OF APPEALS' IMPROPER AND UNWARRANTED EXPANSION OF THE SCOPE OF THE CITY'S HIGHWAY LIABILITY?

Defendant-Appellant City of Lansing says "YES".

Plaintiff-Appellee says "NO".

INTRODUCTION

There are ample and abundant reasons why the Court should presently review the court of appeals' January 20, 2005 Opinion depriving the City of Lansing of its governmental immunity. In addition to the obvious and direct impact which the court of appeals' decision has on the City in the confines of the present case, the ruling will have far greater repercussions and ramifications statewide. The court of appeals' decision affects governmental agencies throughout the State as it relates to their general duty to repair and to maintain highways and especially as it bears on their specific obligations insofar as snow and ice are concerned.

Kevin MacLachlan seeks to recover damages under MCL 691.1402 (1) for the death of David MacLachlan. David MacLachlan was walking in the curb lane of Pennsylvania Avenue in the City of Lansing when he was struck and killed by an oncoming vehicle. Kevin MacLachlan insisted that a three to four foot pile of snow had prevented David MacLachlan from walking to the sidewalk after alighting from a city bus. While the trial court allowed the City to successfully raise its governmental immunity, the court of appeals reversed the trial court's grant of summary disposition.

With little more than a passing reference to MCL 691.1402 (1) and *Nawrocki v Macomb County Road Commission*, 463 Mich 143 (2000), the court of appeals summarily concluded that Kevin MacLachlan had satisfied his burden of pleading a cause of action in avoidance of immunity. From there, and even after acknowledging that a city should not be punished for its snow removal efforts, the court of appeals proceeded to

find that the snow wall along Pennsylvania Avenue constituted an unnatural accumulation. Likewise, the court of appeals declared that Kevin MacLachlan had created a justiciable question of fact relative to whether the unnatural accumulation of snow and ice presented an increased hazard.

From this recitation, is it obvious that the Court of Appeals' immunity analysis was very abbreviated. It is also evident that the Court of Appeals' analysis is both procedurally and substantively flawed.

Factually speaking, the City did indeed dispute whether Kevin MacLachlan had set forth a claim in avoidance of immunity. In fact, the record will show that, throughout the life of this case, the City raised its governmental immunity as a bar to MacLachlan's suit. In its answer to the complaint, the City asserted its governmental immunity defense. The City also brought a motion for summary disposition based on governmental immunity pursuant to MCR 2.116(C)(7). Upon the trial court's entry of a summary disposition in its favor, the City maintained its position on appeal that Kevin MacLachlan lacked a viable highway defect claim in avoidance of immunity. Despite all of this, the court of appeals held that there was "no dispute" that Kevin MacLachlan had stated a claim in avoidance of immunity. The City did all it could to challenge MacLachlan's ability to plead a claim in avoidance of governmental immunity. By granting leave to appeal, the Court can confirm that the course followed by the City of Lansing is the proper way to present and to preserve an argument that a plaintiff has failed to plead a claim in avoidance of governmental immunity.

A proper construction and application of MCL 691.1402 (1) proves the court of appeals' commission of substantive error. Rather than reverse the trial court's summary disposition ruling in favor of the City, the court of appeals should more properly have held per *Nawrocki v Macomb County Road Commission, supra,* that §1402 (1) precludes a finding that an off-road temporary wall of snow and ice constitutes a cognizable highway defect. *Nawrocki* compels the conclusion that a wall of snow and ice is not a defect or dangerous condition of a highway. A plaintiff who bases a claim on an off-road wall of snow and ice cannot fit his case within the precise meaning and operation of MCL 691.1402 (1), and accordingly cannot avoid a city's successful assertion of its governmental immunity. Michigan cities are not insurers of the safety of passage of all of those who traverse their roadways and sidewalks. And this Court has so stated on numerous occasions. See *Kannenberg v The City of Alpena,* 96 Mich 53, 54-55 (1893) and *Navarre v City of Benton Harbor,* 126 Mich 618 (1901). In *McEvoy v City of Sault St. Marie*, 136 Mich 172 (1904), the court made the point that the obligation of a municipality to keep a street in a condition reasonably safe and fit for public travel does not require it to do what "no amount of diligence" can do. Yet, the court of appeals' January 20, 2005 opinion has the very effect of rendering the City of Lansing a near-insurer of those using its highways.

This flows from the court of appeals' unwillingness in its January 20, 2005 opinion to subscribe to the proper strict and narrow construction of Michigan's highway exception to immunity, MCL 691.1402 (1) and *Nawrocki, supra.*. Under *Nawrocki,* snow

and ice does not present a cognizable highway defect. The snow and ice wall of which Kevin MacLachlan complains is an off-road condition. Further, an off-road wall of snow and ice is a transitory condition. The snow and ice will melt and disappear. Those features of remoteness and lack of permanency should have prompted the court of appeals to find, per *Nawrocki*, that a wall of snow and ice is not a highway defect or a dangerous condition of a highway.

With its issuance of *Nawrocki*, the Court returned to a narrow construction of the highway exception predicated upon a close examination of the statute's plain language. It chose this course over adding another layer of judicial gloss to existing interpretations of MCL 691.1402 (1). In seeking to faithfully construe and to apply those public policy choices made by the legislature, the *Nawrocki* court was guided by the controlling principle that the immunity conferred on governmental agencies is broad and that the statutory exceptions thereto are to be narrowly construed. Consistently, the *Nawrocki*, court said that no action may be maintained under the highway exception unless it is clearly within the meaning and scope of MCL 691.1402 (1).

The significant factor in this case is the nature of the alleged highway defect. The condition of which Kevin MacLachlan complains is a three to four-foot high wall of snow and ice alongside Pennsylvania Avenue. The pile of snow was allegedly created by and existed as a result of the City of Lansing's efforts to repair and maintain highways under its jurisdiction, in particular by clearing Pennsylvania Avenue of snow.

The Court has yet to apply *Nawrocki* in the context of an accumulation of snow and ice case. This appeal provides the Court the opportunity to take up that very subject which is of major significance to the jurisprudence of the State. Post-*Nawrocki*, Michigan must decide upon the proper approach to follow in dealing with accumulations of snow and ice created by a governmental agency's snowplowing efforts in fulfillment of the agency's statutory duty to maintain and repair highways under its jurisdiction. This Court now has the chance to speak to the issue. Upon doing so, the Court is sure to hold that a plaintiff lacks a viable highway claim for an off-road accumulation of snow and ice. Under no proper construction of *Nawrocki* can an off-road, temporary pile of snow and ice constitute an actionable highway defect.

This is consistent with *Haliw v City of Sterling Heights,* 464 Mich 297 (2001). There, the Court clarified that, in and of itself, fallen snow does not present a highway defect. Rather, in order to be actionable, there must be a combination of snow and an actual defect in the roadbed designed for vehicular travel. The City proposes further that, if an accumulation of snow is caused by a governmental agency's fulfillment of its obligation to repair and to maintain highways under its jurisdiction, that which was formerly a natural accumulation of snow does not become actionable. Or, as variously stated, as a matter of law, a governmental agency's efforts to fulfill its obligation to repair and maintain highways under its jurisdiction precludes a finding that the product of those snow removal efforts, i.e., an off-road pile of snow and ice, presents an increased hazard

sufficient to support the imposition of liability under the natural accumulation rule and in avoidance of governmental immunity.

One effect of the court of appeals' opinion is to impose on governmental agencies in the course of fulfilling their duty to repair and maintain the further task of handling and of eliminating piles of snow on the sides of the roadway. Recognizing a temporary off-road wall of snow and ice to be a highway defect will mean that scarce public resources will now have to be spent in removing plowed piles of snow alongside highways. Alternatively, governmental agencies with highway jurisdiction may choose to resort to inaction. It may be most advisable for them to simply refrain from undertaking any snow removal. One can only imagine the havoc such an approach would wreak drivers on major streets, like Pennsylvania Avenue in the City of Lansing, would be left to their own devices in tackling snowy and icy road conditions. Traffic would come to a halt.

The court of appeals' opinion will undeniably be the source of confusion to governmental agencies with highway jurisdiction vis-a-vis as their duties and obligations under MCL 691.1402 (1). Until now, a governmental agency did not have to deal with natural accumulations of snow and ice. Still, cities regularly plowed their highways so as to assist their driving citizens as well as to aid citizen pedestrians traversing city sidewalks and highways. Yet, with its January 20, 2005 opinion, the court of appeals has managed to convey to those cities the message that, if they undertake to remove snow, they cannot do it in the traditional way by pushing snow off to the side of the road and by leaving it to melt. That has now become a roadway defect. Rather, the court of appeals

has effectively declared that, once a governmental agency decides to clear its highways of natural accumulations of snow, its duty to repair and maintain encompasses accomplishment of the impossible task of clearing all of the snow away so that no potential highway defects, i.e., "unnatural accumulations" (piles of snow), are eliminated.

It is the City's position that, as a matter of law, a pile of snow and ice on the side of a roadway is not a defect or a dangerous condition of the highway under *Nawrocki*. An off-road pile of ice and snow is not implicated in the term "highway" and cannot be a highway defect. Moreover, in the face of a city's attempts to repair and maintain its highways pursuant to MCL 691.1402 (1), efforts undertaken to fulfill the statutory duty to repair and maintain by clearing and removing snow cannot, as a matter of law, present an increased hazard, a critical component of an unnatural accumulation. Therefore, the City retains its governmental immunity.

It was in the course of the City of Lansing's maintenance of Pennsylvania Avenue that the off-road three to four foot snow bank was created. A consistent and principled application of the law compels the conclusion that a temporary three to four foot high snow bank off the side of a road, which was undisputedly created in conjunction with the City of Lansing's endeavors to meet its duty to repair and maintain Pennsylvania Avenue cannot constitute a defective or dangerous condition giving rise to a claim against the City in avoidance of governmental immunity.

STATEMENT OF FACTS

A. Background

On Friday, December 15, 2000, David MacLachlan (decedent) was a fare-paying passenger riding a CATA bus.[1] The bus was heading southbound on Pennsylvania Avenue in the City of Lansing (Complaint, ¶23). Prior to December 15, 2000, the City of Lansing had sustained multiple snowstorms with significant amounts of snowfall coupled with temperatures consistently below freezing (Complaint, ¶14). The snowfall led to an accumulation of snow and ice in many areas within the City (¶15). While the majority of the city streets were plowed, snow and ice still covered areas of the City involving public and pedestrian travel (Complaint, ¶16).

On December 15 2000, the bus driver stopped the CATA bus at its regular bus stop (Complaint, ¶28). Decedent alighted from the bus. Upon doing so, decedent was caught between the bus and a pile of snow and ice (Complaint, ¶29).

Decedent proceeded to walk in the street northbound on Pennsylvania Avenue. He walked against southbound Pennsylvania Avenue traffic. He was in the lane of Pennsylvania Avenue closest to the curb (Complaint, ¶30). The pile of snow and ice next to decedent was between three and four feet high (*id.*).

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[1] According to plaintiff, decedent had mental and physical disabilities rendering him unable to fully appreciate certain potential dangers to his life and/or his property (Complaint, ¶7). But, on a daily basis, decedent rode as a passenger on a CATA bus to and from his residence to his place of employment (Complaint,¶9).

As decedent proceeded in that fashion, he was struck by a vehicle driven by Robert Zapolski (Complaint, ¶31). Upon impact, decedent was thrown several feet into the air (Complaint, ¶32). Decedent died two days later on December 17, 2000 (Complaint, ¶4).

B. The Instant Litigation

1. The Allegations

Kevin MacLachlan, as personal representative of the estate of David MacLachlan, commenced this action with the filing of a complaint on December 11, 2002. Capital Area Transportation Authority (CATA) and John Doe, a CATA employee, were named as defendants along with the City of Lansing. Plaintiff included five counts in his complaint. Only one of those pertained to the City of Lansing.

In particular, in Count V, which was entitled "Liability of City of Lansing", plaintiff charged that the accumulation of snow and ice in front of the CATA bus stop on Pennsylvania Avenue presented an unnatural accumulation of snow and ice, having been plowed into a "giant wall of snow and ice" such that it amounted to a defect of the improved portion of Pennsylvania Avenue (Complaint, ¶¶82-83). At ¶¶84A.-H., plaintiff complained of the following alleged negligent acts by the City of Lansing: failing to maintain city streets, sidewalks, and surrounding areas reasonably free of excessive ice and snow; creating an unnatural accumulation of ice and snow which partially blocked the traveled portion of the roadway and completely blocked pedestrians from being able to move safely off the main road; failing to ensure that citizens using public transit would

not be exposed to preventable safety hazards, risks of injury, or unreasonable dangers; failing to undertake any and all reasonable measures to keep bus stops and the surrounding areas free from an excessive buildup of snow, ice, and other debris; failing to keep bus stops and surrounding areas reasonably accessible to pedestrians; failing to ensure that passengers would be able to safely move off the main road and to reach an area of reasonable safety upon alighting from CATA vehicles; failing to plan for and to recognize weather-related issues necessitating passenger drop-offs at one or more alternative sites; and failing to timely and effectively enforce its ordinances regarding snow removal by commercial entities.

2. The Motion Proceedings

In answering plaintiff's complaint, the City of Lansing raised its governmental immunity as an affirmative defense. Consistently, the City of Lansing brought a motion for summary disposition pursuant to MCR 2.116(C)(7). In its motion, the City urged that Mr. MacLachlan lacked a viable claim under the highway exception to immunity because piled snow and ice forming a wall alongside Pennsylvania Avenue was not a defect of Pennsylvania Avenue, itself, and, therefore, was not actionable under MCL 691.1402 (1). The City based its position on *Nawrocki v Macomb County Road Commission, supra,* and its progeny. To the City's way of thinking, the alleged condition upon which Kevin MacLachlan predicated his defective highway claim was not a defect of Pennsylvania Avenue, itself but was an off-road condition. As further support for its argument, the

City cited the decision in *Hanson v Board of County Road Commissions of the County of Mecosta, 465 Mich 492 (2002).*

In the alternative, the City urged that the natural accumulation doctrine was not defeated by plaintiff's assertion of the increased hazard exception. The City chose to remove snow from its roads. Its act of removing snow routinely involved plowing the snow to the sides of the roads and onto the curbs. Pushing snow to the sides of the roads and onto curbs created temporary mounds of snow. That result is typical. It cannot be characterized as exceptional or different from conditions that are expected to be present during winter in Michigan. The City also urged the trial court to be mindful of and concerned about the prospect of holding the City answerable in damages when it had taken steps to maintain Pennsylvania Avenue free of snow and ice.

Opposing the City's motion for summary disposition, Kevin MacLachlan maintained that the wall of snow and ice created by the City of Lansing as part of its efforts to clear Pennsylvania Avenue presented a defect in the improved portion of Pennsylvania Avenue. He also insisted that the wall of snow and ice on Pennsylvania Avenue was exceptional or different in character from the usual treatment of snowfall on public streets. Thus, MacLachlan sought to persuade the trial court that the City had improperly introduced a new element of danger to pedestrians who could not escape to safety.

MacLachlan accompanied his response with the affidavit of Gerald Dresslhouse, a civil engineer. There, amongst other things, Dresslhouse opined that the City caused an

unnatural accumulation of snow and ice, thereby creating a three-to-four foot wall on the roadway at the CATA bus stop (Dresslhouse affidavit, ¶6); that the unnatural accumulation of snow and ice introduced a new element of danger to the decedent (Dresslhouse affidavit, ¶11); and that the City's creation of an unnatural accumulation of snow and ice was a proximate cause of decedent's death (Dresslhouse affidavit, ¶12).

3. The Trial Court's Decision

On September 10, 2003, the trial court entertained oral arguments on the pending motions for summary disposition.[2] During those, the City reiterated its reliance upon *Nawrocki.* Inasmuch as there was no defect in the roadbed surface of Pennsylvania Avenue, the City invited the trial court to find that plaintiff had not pled a claim in avoidance of the City's governmental immunity. At the conclusion of the oral arguments, the trial court took the matter under advisement.

On October 1, 2003, the trial court entered an opinion and order granting defendants' motions for summary disposition. Doing so, it rejected MacLachlan's argument that piled snow and ice amounted to a defect of Pennsylvania Avenue:

> The *Nawrocki* holding is determinative of defendant's instant motion in that a pile of ice and snow does not fall within the definition of a "highway defect". Furthermore, the recent Michigan Supreme Court holding in *Hanson v Board of County Road Commissioners of the County of Mecosta,* 465 Mich 492; 638 NW2d 396 (2002), makes it clear that the duty applicable to all governmental agencies relates to actual roadway maintenance and repair issues. *Hanson* at 502.

[2] Defendants CATA and John Doe likewise filed motions for summary disposition based on plaintiff's failure to set forth a cognizable claim in avoidance of the respective defendant's immunity from tort liability.

> Thus, this court finds that plaintiff had failed to state a claim upon which relief can be granted. Defendant City of Lansing's motion for summary disposition is granted.

(Opinion and Order, p 5).

Claiming the trial court's commission of palpable error, Kevin MacLachlan filed a motion for reconsideration. He took that opportunity to repeat his contention that the City's plowing of Pennsylvania Avenue and the creation of a wall of snow and ice introduced a new element of danger to pedestrians, including decedent, who could not escape to safety from the roadway. By way of its order of October 29, 2003, the trial court held that MacLachlan failed to demonstrate the commission of palpable error. Therefore, the trial court denied MacLachlan's motion for reconsideration.

4. The Court of Appeals' Opinion

Kevin MacLachlan timely filed a claim of appeal. On January 20, 2005, the court of appeals issued its opinion. In pertinent part, the court of appeals agreed with Kevin MacLachlan's contention that the trial court erred in granting the City of Lansing's motion for summary disposition. The court of appeals held that the City was liable under the highway exception because the wall of snow and ice was an unnatural accumulation:

> Where a plaintiff pleads a cause of action in avoidance of governmental immunity, the first step of a two-step analysis is satisfied. *Haliw, supra,* at 304. There is no dispute that plaintiff has so plead this case. The plaintiff must still prove the remaining elements of traditional negligence, the second step of the analysis. (*Id.*) Pertinent to the second step of the analysis are concepts such as the "natural accumulation" doctrine. (*Id.* at 305). Under the long recognized "natural accumulation" doctrine, "a governmental agency's failure to remove the natural accumulations of ice and

> snow on a public highway does not signal negligence of that public authority." (*Id.,* quoting *Stord v Transportation Dept,* 186 Mich App 693, 694; 465 NW2d 54 (1991). When, however, the accumulation is the result of unnatural causes, the municipality may be liable, *Hampton v Master Products,* 84 Mich App 767, 770; 270 NW2d 514 (1978).

The court of appeals further stated that under the facts as plead by Kevin MacLachlan, there was no dispute that the wall of snow and ice was created by the City's plowing efforts. Thus, to the court of appeals' way of thinking, reasonable minds could not differ on the fact that the snow wall was an unnatural accumulation. Briefly acknowledging the potential impact of its ruling, the court of appeals was not deterred:

> We recognize that a city should not be punished merely for removing snow from the roadway. *Skogman v Chippewa County,* 221 Mich App 351, 354, 356; 561 NW2d 503 (1997). However, a municipality can be held liable if, in clearing the ice and snow, it "introduced a new element of danger not previously present, or created an obstacle to travel, such as a snow bank, that exceeds the inconvenience posed by a natural accumulation." (*Id.,* at 354). Here it is alleged that a wall of snow and ice, three to four feet high and created by the defendant city caused an unusual obstacle that increased the hazard to decedent. See *id.; Hampton, supra,* at 770. A jury may conclude that city's act of piling ice and snow so high that it would be difficult, if not impossible, to traverse, introduced a new element of danger that exceeded the inconvenience posed by a natural accumulation. Plaintiff through his expert presented evidence that the city had adequate time to remove the snow wall from the bus stop and that it would not have been an unreasonable burden in light of the potential risk for the city to leave or create an opening in the piled snow to allow access to the sidewalk in an area designated as a bus stop. We accordingly conclude that plaintiff has created a justiciable question of fact relative to the alleged unnatural accumulation of ice and snow in the form of a snow wall and in avoidance of governmental immunity.

The City of Lansing now seeks leave to appeal the court of appeals' erroneous decision of January 20, 2005.

ARGUMENT

PLAINTIFF LACKS A COGNIZABLE CLAIM UNDER MCL 691.1402 (1).

A. Standard of Review

An appellate court reviews *de novo* a trial court's ruling on a motion for summary disposition, *Maskery v Board of Regents of the University of Michigan,* 468 Mich 609 (2003); *Hinkle v Wayne County Clerk*, 467 Mich 337, 340 (2002); and *Maiden v Rozwood,* 461 Mich 109 (2000). In addition, the issue of whether a defendant breached the statutory duty to maintain a highway is not a question of fact but is one of law. Issues of law are also reviewed by the Court *de novo*, not under any deferential standard, *Fultz v Union Commerce Associates*, 470 Mich 460 (2004) and *In re Capuzzi Estate*, 470 Mich 399 (2004). In engaging in such review, an appellate court must study the record to determine if the movant was entitled to judgment as a matter of law, *Groncki v Detroit Edison Co*, 453 Mich 644, 649 (1996) and *Adkins v Thomas Solvent Co,* 440 Mich 293, 302 (1992). Stated otherwise, giving the benefit of doubt to the non-movant, an appellate court is charged with independently determining whether the movant would have been entitled to judgment as a matter of law.

Relying upon its governmental immunity, the City of Lansing brought its motion for summary disposition pursuant to MCR 2.116(C)(7). A motion premised on immunity granted by law is properly considered under MCR 2.116(C)(7) as that rule tests whether a

claim is barred because of immunity granted by law, *Fane v Detroit Library Commission,* 465 Mich 68 (2001). In order to survive a motion for summary disposition based upon a governmental immunity defense, a plaintiff is bound to allege facts justifying the application of an exception to governmental immunity (*id.)*. An appellate court reviews the affidavits, pleadings, and other documentary evidence submitted by the parties and, where appropriate, construes the pleadings in favor of the non-moving party, *Bryant v Oakpointe Villa Nursing Center Inc,* 471 Mich 411 (2004) and *Sewell v Southfield Public Schools,* 456 Mich 670 (2001). A motion brought pursuant to MCR 2.116(C)(7) is properly granted if no factual development could provide a basis for recovery, *Haliw v Sterling Heights, supra..*

B. <u>Michigan's Governmental Immunity Scheme</u>

It is generally acknowledged that the decision in *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567 (1984) ushered in a new era in the law of governmental immunity in Michigan. The *Ross* court set out to define the parameters and the scope of Michigan's statutory immunity scheme. Doing so, the court described MCL 691.1407, "the heart" of Michigan's governmental tort liability act, as providing "broad" immunity from tort liability to governmental agencies whenever they are engaged in the exercise or discharge of a governmental function, 420 Mich at 595. Upon embracing a definition of the term "governmental function", the *Ross* court had the following to say about Michigan's statutory governmental immunity scheme:

> [T]he immunity from tort liability provided by Sec. 7 is expressed in the broadest possible language – it extends

> immunity to all governmental agencies for all tort liability whenever they are engaged in the exercise or discharge of a governmental function. This broad grant of immunity when coupled with the narrowly drawn statutory exceptions, suggests that the legislature intended the term "governmental function" to be interpreted in a broad manner. (Emphasis in original).

420 Mich 567, 617. Later, at pp 620-621 of its opinion, the *Ross* court again explicitly recognized the broad scope of its governmental function definition:

> We realize that the definition we have formulated today is broad and encompasses most of the activities undertaken by governmental agencies. We have adopted this approach because we believe that this is the result envisioned by the enactors of the governmental immunity act.

Post-*Ross* decisions have followed the pronouncement that MCL 691.1407 provides "broad" immunity from tort liability. See, for example, *Peterman v Dept of Natural Resources,* 446 Mich 177, 203 (1994) and *Nawrocki v Macomb County Road Commission, supra.* Significantly, the *Nawrocki* court expressed concern that courts' failure to consistently follow *Ross, supra,* specifically with reference to the interpretation and the application of the highway exception to governmental immunity, MCL 691.1402 (1), precipitated an exhausting line of confusing and contradictory decisions. To the *Nawrocki* court's view, the area of the law cried out for clarification and that Court took up the task of addressing the operation of the highway exception. Doing so, the court set out its goal to arrive at a system or scheme that comported with the statutory language and with the legislature's policy choices in enacting the statute in the first instance:

> Accordingly, we return to a narrow construction of the highway exception predicated upon a close examination of the statute's plain language, rather than merely attempting to add still another layer of judicial gloss to those interpretations of the statute previously issued by this Court and the Court of Appeals. We believe that such an approach will maintain fidelity to the requirements set forth by the legislature, while providing the lower courts with a clearer standard to follow when applying the highway exception in individual cases. However, we refuse to impose upon the people of this state our individual determinations of proper public policy relating to the availability of lawsuits arising from injuries on the public highways. Rather, we seek to faithfully construe and apply those stated public policy choices made by the legislature when drafting the statutory language of the highway exception.
>
> Because prior decisions of this court have improperly broadened the scope of the highway exception and provided a variety of contradictory and conflicting interpretations of this exception's statutory language, we believe it is impossible to avoid overruling some precedent, if we are to set forth a clear rule of law. While we emphasize that we do not lightly overrule existing precedent, we are duty-bound to overrule past decisions that depart from a narrow construction and application of the highway exception and the plain language of the statutory clause, especially when they disregard and they are inconsistent with, other decisions of this Court.

463 Mich 143, 150-151.

In its more recent opinion in *Mack v City of Detroit*, 467 Mich 186 (2002), the Court again embraced the rule that governmental immunity is a characteristic of government. As such, it is incumbent upon a plaintiff to plead in avoidance of immunity. Stated otherwise, a plaintiff bears the burden of pleading facts in the complaint that show that the action is not barred by the governmental immunity act. It is the responsibility of

the party seeking to impose liability on a governmental agency to demonstrate that the case falls into one of the exceptions to immunity. Burdening a plaintiff with the job of pleading in avoidance of governmental immunity is consistent with a central purpose of immunity, that is, to prevent a drain on the state's financial resources by avoiding even the expense of having to contest on the merits any claim barred by governmental immunity. See also, *Fane, supra*.

A plaintiff pleads in avoidance of governmental immunity by stating a claim that fits within a statutory exception or by pleading facts that demonstrate that the alleged tort occurred during the exercise or discharge of a nongovernmental or proprietary function. For example, a plaintiff successfully pleads in avoidance of immunity under §1402 when he shows that the alleged injury occurred in a location encompassed by that statute *Haliw,* supra, at p 304.

Here, Kevin MacLachlan purported to plead in avoidance of immunity. But no facts are alleged, let alone proven, that an off-road accumulation of snow and ice constituted a defect of Pennsylvania Avenue, itself. Because of MacLachlan's failure to plead a claim under the highway exception to immunity, the court of appeals was bound to affirm the dismissal of MacLachlan's cause of action on the basis of governmental immunity.[3]

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[3] The *Haliw* court reiterated the point that a municipality's maintenance and repair of "highways", constitutes the performance of a governmental function, 464 Mich at pp. 303-304, n 7.

C. **MCL 691.1402 (1)**

Consistent with *Ross, supra*, all governmental agencies are immune from tort liability for actions taken in furtherance of a governmental function, MCL 691.1407(1). That statute reads as follows:

> Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function. Except as otherwise provided in this act, this act does not modify or restrict the immunity of the state from tort liability as it existed before July 1, 1965, which immunity is affirmed.

The term "governmental agency" is defined to include municipal corporations such as the City of Lansing. See MCL 691.1401(d). As emphasized above, the immunity conferred on governmental agencies is broad, *Robinson v Detroit,* 462 Mich 439, 455 (2000). However, there are several narrowly drawn exceptions to governmental immunity, including the highway exception set forth at MCL 691.1402 (1).

The present statutory language found in MCL 691.1402 (1) focuses on a more tightly drawn duty reflecting a departure from the inclusive tone of prior legislation. Decedent's accident occurred on December 15, 2000. Accordingly, the statutory language of 1999 PA 205, effective December 21, 1999, governs here. That statute reads in pertinent part as follows:

> Except as otherwise provided in §2(a), each governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its

> jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency. The liability, procedure, and remedy as to county roads under the jurisdiction of the county road commission shall be as provided in §21 of Chapter IV of 1909 PA 283, MCL 224.21. The duty of the state and the county road commission is to repair and maintain highways, and the liability for that duty, extends only to the improved portion of the highway designed for vehicular travel and does not include sidewalks, trailways, crosswalks, or any other installation outside of the improved portion of the highway designed for vehicular travel. . . .

Per the clear and plain import of its wording, MCL 691.1402 (1) waives the immunity of governmental agencies with respect to defective highways under their jurisdiction. As emphasized by the courts in *Scheurman v Dept of Transportation,* 434 Mich 619, 630 (1990) and *Nawrocki, supra,* there must be strict compliance with the conditions and restrictions of MCL 691.1402 (1). Thus, in order to prevail in the face of a governmental agency's immunity defense, a plaintiff must bring its suit within the precise language and intendment of MCL 691.1402 (1), *Hatch v Grand Haven Charter Twp,* 461 Mich 457, 464 (1990).

As to the operation and intendment of MCL 691.1402 (1), the *Nawrocki* court found the structure of the statute critical to its meaning. The Court offered the following analysis of the components of §1402 (1). The first and second sentences of §1402 (1) apply to all governmental agencies having jurisdiction over highways. Thus, they govern as to municipalities. The first sentence imposes on all governmental agencies with highway jurisdiction a duty to keep a highway in reasonable repair. The phrase "so that it is reasonably safe and convenient for public travel" states the desired outcome of

reasonably repairing and maintaining a highway but does not establish a second duty to keep a highway reasonably safe.

The second sentence of §1402 (1) describes those persons who may generally recover damages when injured by a breach of the duty created by the first sentence. It merely establishes liability for a breach of the duty created by the first sentence. It does not give rise to a second exception outside the duty to repair and to maintain a highway.

The third and fourth sentences of §1402 (1) address more specifically the duty and the resulting liability of the state and of the county road commissions. More particularly, the third sentence focuses upon the duty and resulting liability of county road commissions. The language of the fourth sentence limits the duty of the state and of the county road commissions with respect to the location of the alleged dangerous or defective condition. Because the *Nawrocki* court was persuaded that the duty imposed on the state and on the county road commissions by the highway exception is only to repair and to maintain the improved portion of the highway designed for vehicular travel, it held that the actual language of §1402 (1) sets forth an exception to immunity that encompasses only the traveled portion, paved or unpaved, of the roadbed designed for vehicular travel. It expressed concern about the state of affairs should the Court have chosen a different scheme:

> Unless we construe the highway exception narrowly, as mandated by *Ross* and in accordance with the language of the statutory clause, every accident and every injury, occurring on an otherwise unexceptional highway, containing no dangerous or defective conditions in the actual roadbed itself, will become the potential basis for a lawsuit against the state or county road commissions.

> This is an extraordinary proposition not contemplated, in our judgment, by the legislatures' narrowly drawn highway exception... 163 Mich at 177-178.

The court went on to observe that:

> There is potentially no end to the creative and innovative theories that can be raised to support the proposition that a highway accident, occurring upon even the most unremarkable thoroughfare, was, in fact, the result of inadequate or imperfect signage. Courts possess no greater insight than the state or county road commissions into matters involving traffic control devices, such as traffic signs. Maintenance of an appropriate deference for, and application of, the public policy choices made by the legislature, as reflected in the plain language of the statutory highway exception, ensures that determinations regarding how best to allocate limited public highway funds are left to the proper authorities. 463 Mich at 179.

In *Nawrocki*'s companion case of *Evens v Shiawassee County Road Commissioners*, the Court took up the question of whether the state or a county road commission has a duty to install, maintain, repair or improve traffic control devices, including traffic signs. In that context, the Court overruled *Pick v Gratiot County Road Commission*, 451 Mich 607 (1996). It determined that *Pick* unacceptably departed from the plain language of the highway exception by allowing a plaintiff to avoid governmental immunity for conditions arising at "points of hazard" affecting travel on the surface of the improved portion of the highway, regardless of whether the condition originated on the surface of the roadbed or not. Nowhere in the language of MCL 691.1402 (1) do the phrases "point of hazard" or "traffic sign maintenance" appear. Thus, the Court declined to follow the "points of hazard" approach and announced that

the highway exception does not contemplate conditions outside the actual roadbed designed for vehicular travel.

The *Hanson* court further limited the scope of a governmental agency's duty under the highway exception. In addition to reiterating the prior holding from *Nawrocki*, the *Hanson* Court rejected the plaintiffs' claims concerning the road commission's failure to design the roadway to eliminate the dangerous condition. The Court concluded that the plain language of the highway exception provides for a duty to repair and to maintain but no duty to design or redesign a road to eliminate points of hazard or to fix other design defects.

Applying *Nawrocki* and *Hanson*, the Court properly concludes that Kevin MacLachlan's action is not maintainable under MCL 691.1402 (1). The alleged defective condition involved here, an off-road pile of snow and ice that would eventually melt away, is not an actual defect in the roadbed of Pennsylvania Avenue. It does not present a breach of the City's duty to repair and maintain Pennsylvania Avenue.

D. The Court of Appeals' Failure to Abide by Controlling Principles of Governmental Immunity Law.

1. Snow piled alongside a highway is not a highway defect.

Kevin MacLachlan's theory of liability is not based upon an actual defect of Pennsylvania Avenue. Rather, Kevin MacLachlan premises his action on excessive snow and ice on the side of Pennsylvania Avenue. In fact, the roadway, itself, was clear enough so as to allow decedent to walk on it. Yet, a city's statutory duty under MCL 691.1402 (1) extends only to the maintenance and repair of the roadbed itself, *Nawrocki*.

Because the claimed negligence does not involve a physical defect or disrepair of the road itself, the highway exception does not apply here.

As a factual matter, Kevin MacLachlan pled no other danger to decedent than that arising from the presence of the off-road snow wall. There was no claim by MacLachlan that Pennsylvania Avenue was not properly constructed or was otherwise defective. It was the ordinary, usual, open and exposed roadway in its original condition and the roadway was not unsafe or dangerous. If the liability of a city for damages resulting from a failure to keep its highways in a reasonably safe condition for travel is to extend to cases where such conditions are not ascribable to actual defects in the maintenance and repair of a city's streets, it may be contended that courts have abandoned the principle calling for a narrow construction of the highway exception to immunity, and, in lieu thereof, have embraced a countervailing principle to *Nawrocki*. Yet, this Court's careful parsing of the language of MCL 691.1402 prompted it to interpret and to apply the language of MCL 691.1402(1) as it did in *Nawrocki*. With *Nawrocki* providing clear guidance to it, the court of appeals should not have strayed from its holding. The rule of law from *Nawrocki* should have proven controlling.

MacLachlan alleged that the City of Lansing piled snow along southbound Pennsylvania Avenue and that said temporary and off-road condition constituted an actionable highway defect. However, that result does not comport with a proper reading of *Nawrocki*. Under the holding of *Nawrocki,* a wall of snow and ice piled alongside a highway would not be implicated in the statutory definition of "highway".

In *Hanson v Board of County Road Commissioners of the County of Mecosta, supra,* the Court refined the *Nawrocki* holding by concluding that a road commission's duty does not include a duty to correct design defects, 465 Mich at 498. To that end, the *Hanson* court pronounced that the only statutory requirement and the only mandate that, if ignored, could form a basis for tort liability under MCL 691.1402 (1) was the failure to "maintain a highway in reasonable repair". The plain language of MCL 691.1402(1) provides that a governmental agency with highway jurisdiction has a duty to repair and maintain, not a duty to design or redesign. The terms "defect" and "dangerous or defective condition" do not expand that statutory duty but instead describe the general conditions that trigger the statutory duty to "repair and maintain". Thus, the *Hanson* court reaffirmed the legislature's clear limitation on the duties of governmental agencies concerning the repair and maintenance of roadways. Here, the court of appeals ignored the binding precedent of this Court's decisions in *Nawrocki* and *Hanson*. Therefore, it is properly said that the court of appeals' opinion fails to pay heed to the basic principles so important to this Court in *Nawrocki* and *Hanson*, to wit: the immunity conferred on governmental agencies is broad and the statutory exceptions thereto are to be narrowly construed. In short, MacLachlan's claim fell outside the meaning and scope of §1402.

The rationale of the court of appeals in *Weaver v Detroit,* 252 Mich App 239 (2002) is also supportive of the City of Lansing's position. The *Weaver* opinion followed the convening of a special panel to resolve the conflict between *Ridley v City of Detroit,* 246 Mich App 687 (2001) and *Weaver v City of Detroit*, 249 Mich App 801 (2002)

(*Weaver* I). The question before the special panel was whether a municipality can be held liable in tort for the alleged negligent maintenance of a streetlight pole. The court in *Weaver I* had held that a streetlight pole is not implicated in the definition of the term "highway" found at MCL 691.1401(e) and thus, that the highway exception did not apply to a claim involving a city's negligent maintenance of a streetlight pole. In embracing the analysis followed in *Weaver I*, the *Weaver* special panel adhered to the *Nawrocki* holding and found no reason to distinguish *Nawrocki* merely because the defendants there were not municipalities:

> We find these distinctions to be insignificant when the facts of this case are analyzed in a manner consistent with the essential theme of the Supreme Court's decision in *Nawrocki*. Critical to the court's analysis in *Nawrocki*, is the basic principle that "the immunity conferred upon governmental agencies is broad, and the statutory exceptions thereto are to be *narrowly* construed. *Nawrocki*, 463 Mich at 158. Consistent with this principle, [n]o action may be maintained under the highway exception unless it is clearly within the scope and meaning of [MCL 691.1402(1)]". (Citation omitted).
>
> Applying these principles, we conclude that the highway exception to governmental immunity does not apply here, so the streetlight pole is not part of the "highway". At the time of the accident, MCL 691.1401(e) defined highway to mean "every public highway, road, and street which is open for public travel and shall include bridges, sidewalks, crosswalks and culverts on any highway . . .
>
> We agree with the *Weaver I* panel and hold that, as with traffic signals and signs, see *Nawrocki* at 180, 182, 182 n 37, the plain language of the statute does not support the conclusion that streetlight poles are included within the definition of the term "highway", *Weaver I* at 804. Accordingly, we reject as inconsistent with the plain language

> of the statute, the holding in *Ridley (On Remand)* that a streetlight pole is part of the "highway" because it is not specifically excluded from the definition of "highway" in MCL §691.1402(e). The Court in *Ridley (On Remand)* also concluded that the highway exception to governmental immunity applies to cases involving negligent failure to provide streetlighting because a street light pole is not a utility pole as provided in MCL §691.1401(e). However, because a streetlight pole is not included in the definition of "highway", we need an do not decide whether the court in *Ridley (On Remand)* correctly decided this question . . . (emphasis in original).

These cases prove that the trial court properly granted the City of Lansing's summary disposition motion inasmuch as the alleged defect of which Kevin MacLachlan complained, i.e., snow and ice alongside Pennsylvania Avenue, was not a defect of Pennsylvania Avenue, itself. The wall of snow and ice was a transitory off-road accumulation. It afforded Kevin MacLachlan no viable claim against the City.

2. The Natural Accumulation Doctrine is not an exception to governmental immunity.

A refusal to recognize snow and ice as presenting an actionable highway defect is consistent with Michigan's natural accumulation doctrine. The doctrine holds that a governmental agency's failure to remove natural accumulations of ice and snow does not automatically constitute negligence on the part of the governmental agency, *Reese v Wayne County*, 193 Mich App 215, 217 (1992). In particular, Michigan has long held that a property owner has no liability for a plaintiff's injuries caused solely by a natural accumulation of ice or snow, *Lubbers v Manlius Twp*, 172 Mich App 387 (1912); *Stanton v Webster Twp*, 170 Mich 428 (1912); and *Johnson v City of Marquette*, 154 Mich 50

(1908). As otherwise stated, a municipality in Michigan is not negligent if it omits to protects pedestrians from dangers to life and health which are caused by accumulations of ice and snow from natural causes, *Mayo v Village of Baraga*, 178 Mich 171 (1913); *Wesley v Detroit*, 117 Mich 658 (1898); and *Johnson v Pontiac*, 276 Mich 103 (1936). Consequently, the presence of a natural accumulation of snow on a reasonably maintained sidewalk cannot serve as the basis for the imposition of liability, *Zielinski v Szokola*, 167 Mich App 611 (1988), overruled in part on other gds, 231 Mich App 361 (1998). This is so regardless of whether the governmental agency had actual or constructive notice of a natural accumulation of snow and ice and allegedly had the ability to remove the snow, *Williams v MDOT,* 208 Mich App 71, 72 (1994).

In *Mayo v Village of Baraga*, 178 Mich 171 (1913), the court warned about the expansive liability that might ensue were liability to be imposed upon a governmental agency for natural conditions:

> If the liability of a city for damages resulting from a failure to keep its highways in a reasonably safe condition for travel extends to cases where such condition is not ascribable to defects in the construction and maintenance of the way, or to the action of the officers of the city or their negligence in the performance of a duty, it may be contended that cities must cause the streets to be patrolled, in search of bricks or coals that fall from wagons, for the treacherous banana peel, upon which the unwary are sure to slip, and for tacks or bits of glass or other rubbish which puncture the tires of bicycles. I think such are not defects in the highway.

178 Mich at 174.

In *Hutchinson v City of Ypsilanti,* 103 Mich 12 (1894), the plaintiff's cutter was overturned by an accumulation of snow and ice on a street in the defendant city. Some of the snow had been thrown off the streetcar tracks by the streetcar company where the tracks curved around a corner. There had been a heavy snow about a week before the accident and other snows had fallen in the meanwhile. The plaintiff and her husband drove upon the ridge of snow and ice and suffered the injuries of which they complained. In affirming a judgment for the city, the court declined to find the city liable for piles of snow created as a result of snow removal:

> Private persons and municipalities have the right to remove the snow from sidewalks for foot travel and, in cases of deep snows, to clear a track in the highways for the passage of vehicles. This necessarily implies the piling up of snow to a greater or less extent along the sides of the streets and at the crossings. It would be unjust to hold municipalities liable for damages for such accumulations which have been changed by the weather to ice. The intention of the legislature to create such a liability must clearly appear. It does not appear in the statute.

103 Mich at pp 13-14.

The court in *McKellar v City of Detroit*, 57 Mich 158 (1885) acknowledged that it would be a great hardship and involve ruinous expense if all of the multitude of ways which are subject to be affected by winter storms are to be constantly watched and diligently kept in thoroughly good condition. Most communities may be relied upon to do what is necessary and feasible. But no amount of diligence can supply an adequate force and adequate means to detect inevitable accumulations of snow trampled into hardness on every crosswalk or on every roadway, *McKellar, supra*, at p 161-162.

In sum, the natural accumulation doctrine provides that a governmental agency's failure to remove ice or snow from a highway does not, by itself, constitute negligence, *Haliw, supra,* at p. 308. Pursuant to the natural accumulation doctrine, a plaintiff must prove that there was an existing defect of the sidewalk/highway rendering it not reasonably safe for public travel. (*Id.*). Applying the natural accumulation doctrine to the facts before it, the *Haliw* court concluded that a natural accumulation of ice on the sidewalk, without warning, did not constitute a breach of the defendant's statutory duty to maintain the sidewalk in reasonable repair. That plaintiff was bound to prove that her injuries resulted from a defect of the sidewalk, as distinct from the accumulation of snow and ice:

> Simply put, a plaintiff cannot recover in a claim against a governmental agency where the sole proximate cause of the slip and fall is the natural accumulation of ice or snow. This is true even where the ice or snow naturally accumulates on a portion of the highway (i.e., sidewalk) that was otherwise not "reasonably safe and convenient for public travel..." *Hopson, supra* at 250. Rather, there must exist a combination of the ice or snow and the defect that, in tandem, proximately causes the slip and fall. Thus, even if we accept plaintiff's claim, in the present case, that a depression in the sidewalk allowed the ice to form and be present, we conclude that such a depression under the facts here, did not render the sidewalk out of repair within the meaning of subsection 1402(1).

464 Mich 297, 311-312.

An accumulation of fallen snow on Pennsylvania Avenue in December would constitute a natural accumulation. In the absence of any defect of the roadway of Pennsylvania Avenue, the accumulation of snow would not subject the City of Lansing to potential liability, *Haliw, supra*, at p. 312. The removal of a natural accumulation of

snow in fulfillment of the City's obligation to repair and maintain the road cannot give rise to an unnatural accumulation and thus be the potential source of liability for a city.

3. A pile of snow and ice created by the activity of a city in carrying of a statutory duty under MCL 691.1402 (1) cannot constitute an actionable highway defect.

Kevin MacLachlan alleged in the complaint that significant amounts of snow had fallen on the City of Lansing before December 15, 2000. Per the natural accumulation doctrine, the City was not required to take any action to clear the streets under its jurisdiction of snow. However, the City chose to clear the snow on Pennsylvania Avenue, and in doing so, plowed the snow to the side of the roadway. A governmental agency's act of removing snow from the roads routinely involves pushing the snow to the sides of the roads and on to the curbs. That creates temporary mounds of snow on the curbs and at the sides of a road. Such a result is typical and cannot be characterized as exceptional or different from conditions that are expected in the winter time in Michigan, *Skogman v Chippewa County Road Commission*, 221 Mich App 351, 355 (1997).

To be actionable, the interference with travel presented by an unnatural accumulation of snow must be unusual or exceptional, that is, different in character from the conditions ordinarily and generally brought about by winter weather in a given locality, *Skogman, supra*, and *Hampton v Master Products, Inc*, 84 Mich App 767, 770 (1978). Some courts have stated the test to be whether the defendant's actions "increased the hazard" to the plaintiff (*id.*). In short, under the increased hazard theory, the defendant's act of removing snow and ice must have introduced a new element of danger

not previously present or created an obstacle to travel that exceeds the inconvenience posed by a natural accumulation, *Johnson v Marquette,* 154 Mich 50 (1908).

At the same time, courts readily agree that this increased hazard theory is not to be applied in the manner that punishes the governmental agency which attempts to remove snow or ice while rewarding an agency that takes no action, *Haliw v Sterling Heights,* 464 Mich at 305-308, and *Skogman, supra*, at pp. 353-354. See also, *Davis v Morton,* 143 Mich App 236, 241 (1984) and *Zielinski, supra*. In these days of scarce public funds and resources, this word of warning is particularly appropriate. As mentioned above, a city has no obligation to remove and clear snow which results from a natural accumulation. Now, under the court of appeals' scheme, cities with highway jurisdiction are in a real quandary. For it seems that, based upon the court of appeals' opinion, cities are now effectively burdened with the additional responsibility of removing the snow totally.

As in *Skogman*, the court of appeals here should have affirmed because the City's actions in plowing Pennsylvania Avenue did not introduce a new element of danger or create exceptional conditions different in character from those to be expected in Lansing in December. In and of itself, a governmental agency's effort to clear an accumulation of snow does not automatically make the snow piled on the side of the roadway an unnatural accumulation, *Skogman, supra*, at p 356. Governmental agencies aim to keep their roads passable and open. The way to accomplish that is by plowing the snow away. As the *Skogman* court so aptly observed, the public policies concerned dictate that the increased

hazard theory should not be used to create liability in contravention of the natural accumulation doctrine. That is especially so when the governmental agency has not created an unusual obstacle to travel. Kevin MacLachlan's claim amounts to an assertion that the City had a duty to make a reasonably safe road safer still. The City had no such duty, *Skogman, supra*, and *Wechsler v Wayne County Road Commission*, 215 Mich App 579, 594-595 (1996).

No new element of danger is introduced by way of the City's decision to plow significant snowfall off the traveled portion of Pennsylvania Avenue onto the side of the road. In the unpublished decision of *Maki v City of Owosso,* Court of Appeals Docket No. 241256, 12/4/03, a panel of the Court of Appeals, including Judge Christopher M. Murray, who sat as a panel member in this case, spoke to the common practice of plowing roads in Michigan:

> Defendant was not required to take any action to clear the streets under its jurisdiction of snow. *Haliw, supra.* Defendant chose to clear the roads, and in doing so plowed snow to the sides of the roads and on to the curbs. The snow piled at the curbs constituted an unnatural accumulation. However, a governmental agency can be liable only if its efforts to remove snow from highways increase the hazards to travelers by creating a new danger or obstacle that exceeded the danger or obstacle originally caused by the natural accumulation. *Skogman, supra; Hampton v Master Products, Inc*, 84 Mich App 767, 770; 270 NW2d 514 (1978). Defendant chose to remove snow from the roads. A governmental agency's act of removing snow from the roads routinely involves pushing the snow to the sides of the roads and on to the curbs. Pushing snow to the sides of the roads and on to curbs creates temporary mounds of snow on the curbs and often at corners. Such a result is typical, and cannot be characterized as exceptional or different from conditions that are to be expected in the winter in Michigan. *Skogman, supra*. . . . The trial court correctly concluded that defendant was entitled to

> the protection of the Natural Accumulation Doctrine, *Haliw, supra; Skogman, supra,* 353-354, and properly granted defendant's motion for summary disposition. (Emphasis added.)

This is precisely the City's position that. As a matter of law, a pile of snow created as a result of the City's efforts to fulfill its duty to repair and maintain its highways cannot increase the hazard presented and, therefore, qualify as an actionable unnatural accumulation.

In *Woodworth v Brenner*, 69 Mich app 277 (1976), the court cited the case of *Taggart v Bouldin*, 168 A 570 (NJ 1933). The passage which the *Woodworth* court quoted spoke of the injustice which would result were a court to hold a property owner answerable in damages for injuries received because of an effort made to keep the sidewalk or highway clear and to reduce the danger to pedestrians or motorists. The injustice to which the *Taggart* court alluded has come to fruition via the court of appeals' January 20, 2005 opinion in this case. With its reversal of the trial court's grant of summary disposition to the City of Lansing, the court of appeals has allowed for the City to be held answerable in damages for injuries received following its good faith efforts to clear Pennsylvania Avenue of snow while carrying out its statutory to maintain and repair Pennsylvania Avenue. This does not represent the strict and narrow interpretation of the exceptions to governmental immunity embraced by this Court in numerous of its decisions. The City of Lansing, as well as cities throughout the state, welcome and invite the Court's review of this case which affords the Court a timely and meaningful

opportunity to address in this post-*Nawrocki* era the snow removal duties of governmental agencies with highway jurisdiction.

RELIEF

WHEREFORE, defendant-appellant City of Lansing, respectfully requests that the Court peremptorily reverse the Court of Appeals' January 20, 2005 opinion reversing the trial court's October 1, 2003 opinion and order granting summary disposition to the City of Lansing and, failing that, grant this application for leave to appeal.

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